

State's Motion. Furthermore, in order to address the imminent and substantial endangerment explained in the State's Motion, the State requests that the hearing occur prior to the next cycle of poultry waste disposal in the Illinois River Watershed.¹

II. The State's Scheduling Proposal

The State proposes the following schedule:

Defendants' Response to the State's Motion for Preliminary Injunction	December 17, 2007
Designation of Defendants' Preliminary Injunction Expert Witnesses	December 17, 2007
Defendants' Depositions of the State's Preliminary Injunction Expert Witnesses ²	Completed by January 15, 2008
State's Depositions of Defendants' Preliminary Injunction Expert Witnesses	Completed by January 15, 2008
State's Reply to Defendants' Response to the State's Motion for Preliminary Injunction	January 15, 2008
Exchange of Witness and Exhibit Lists	January 15, 2008
Evidentiary Hearing (1 week)	As soon after January 15, 2008, as the Court's schedule permits

This schedule gives both sides the opportunity to conduct discovery limited to the issues before the Court and to present the Court with the record it requires to make a decision on the temporary and preliminary relief sought by the State. In contrast, the schedule proposed by Defendants is entirely unwarranted in light of the nature of the remedy sought.

¹ In their motion, Defendants raise a number of unfounded diversionary arguments that have nothing to do with setting a scheduling order for the State's Preliminary Injunction Motion. To the extent they go to the merits of whether a preliminary injunction should be issued, and are raised in Defendants' response to the State's Motion, the State will address such arguments in its reply brief.

² The State's Motion for Preliminary Injunction, filed on November 14, 2007, had extensive affidavits of the State's expert witnesses attached to it. By letter dated November 28, 2007, the State has offered Defendants dates on which to depose these expert witnesses that are consistent with this proposed schedule. *See* Exhibit 1.

III. The State's Scheduling Proposal Is Appropriate

A. The State's scheduling proposal takes into account the fact that its Motion addresses a substantial and imminent threat to human health

The practical effect of Defendants' proposed schedule would be to allow for another year of dangerous land disposal of poultry waste. Defendants do not rebut -- because they cannot rebut -- the fact that another cycle of land disposal of poultry waste will recharge the bacterial contamination of the waters of the Illinois River Watershed. *See, e.g.*, DKT #1373 (Harwood Aff., ¶ 9; Teaf Aff., ¶ 20). And so, unless the land disposal of poultry waste is abated, in the coming months a new threat to human health -- a new emergency -- will be created. The seriousness of this threat cannot be overstated. As explained in the affidavits to the State's Motion:

- "The foregoing information and analyses show that the disposal of poultry waste by land application in the IRW represents a present, substantial, and serious threat to human health. There are biological hazards and impairments from bacteria associated with land spreading of poultry manure and litter within the IRW which are present at levels that are capable of causing damage to human health and which will continue to pose such risks until action is taken to eliminate the principal sources of these hazards and impairments." DKT #1373 (Teaf Aff., ¶ 20).
- ". . . [T]he disposal of poultry waste by land application in the IRW presents a substantial, serious and immediate threat to human health." DKT #1373 (Harwood Aff., ¶ 8).
- "The material I have reviewed indicates that on a regular basis bacterial contamination of the Illinois River, its watershed, and shallow wells within the watershed exceeds levels considered a threat to public health. Recreational use of the Illinois River by tens of thousands of people each year places them at an unacceptable risk for exposure to pathogens arising from poultry waste" DKT #1373 (Lawrence Aff., ¶ 9).

An emergency plainly exists, and therefore the State submits that it is imperative that a schedule be entered that addresses this problem before the new cycle of poultry waste disposal.

B. The State's scheduling proposal takes into account the fact that Rule 26(a)-type discovery is not appropriate in the context of a hearing on a motion for temporary relief

Defendants are confusing a preliminary injunction hearing with a trial on the merits.

Rule 26 governs expert witness disclosures for use at the trial of a matter. Specifically, Rule 26(a)(2) provides as follows:

In addition to the disclosures required by paragraph (1), a party shall disclose to other parties the identity of any person who may be used at trial to present evidence under Rules 702, 703, or 705 of the Federal Rules of Evidence.

Fed. R. Civ. P. 26(a)(2)(A) (emphasis added). Restricted to trials, this Rule clearly does not apply to witnesses expected to testify at preliminary proceedings. *See, e.g., Seattle Audubon Society v. Sutherland*, 2007 WL 1655152, *1 (W.D. Wash. June 5, 2007) ("Rule 26(a)(2)(C) is inapplicable here, where the parties are not preparing for trial, but for a preliminary injunction hearing").

The State has filed a motion for a preliminary injunction, not a trial. Defendants nevertheless appear to be seeking full disclosures and final reports on all aspects of the litigation as if it were a trial. *See, e.g.,* Exhibit 2 (Nov. 16, 2007 letter from the Cargill Defendants' counsel); Exhibit 3 (Defendant Tyson Foods, Inc.'s November 16, 2007 Requests for Production of Documents to Plaintiffs). Defendants' sought-after discovery is thus overbroad and premature. Indeed, under the Amended Scheduling Order, this Court has set an April 1, 2008, deadline for Rule 26(a)(2) disclosures, and it is at that time the State will provide the complete opinions of the experts from whom it intends to elicit testimony at the trial of this matter. With the affidavits already on file and the depositions of the experts the State relies on in support of its Motion for Preliminary Injunction, Defendants will have the necessary information to prepare

any defense they might raise. Protracted discovery on a request for preliminary relief -- while Defendants continue to pollute the waters of Oklahoma -- serves no legitimate purpose.

C. The State's scheduling proposal takes into account the fact that Defendants have had access to the State's sampling information for many months

Defendants continue to argue that the State has not produced any of the data upon which its experts rely and that they somehow, despite the significant discovery that has been conducted in this case, do not understand the State's claims. Defendants' arguments are inaccurate and disingenuous.

On February 1, 2007, the State began producing to Defendants their sampling data, field notebooks, pictures of sampling, investigator notes concerning Defendants' waste disposal practices and pictures associated with that investigation. This included bacterial analysis of samples of waste from Defendants' poultry growing operations; soils from fields on which the waste had been spread; water collected at the edge of fields; and water collected both at high and low flow stations throughout the watershed. The State has supplemented its productions of this information on a rolling basis since that time. Defendants know the results of the sampling, and have had time to analyze them. Additionally, Defendants will have the opportunity to depose the State's experts. Defendants will not be prejudiced by the State's proposed schedule. There is no need to extend the deadline in the manner proposed by Defendants. Delaying the hearing is unwarranted.

IV. Conclusion

The State is entitled to a hearing on its Motion for Preliminary Injunction as soon as the Court's schedule permits. As set forth in more detail in its Motion, the continued application of poultry waste -- and consequent pollution of the waters of the State -- presents an imminent risk of endangerment to human health. Limited discovery with respect to the relief sought by the State

and a condensed schedule as set forth above in Section II would serve the interests of all concerned. This Court has the ability to put a stop to Defendants' harmful practices until this matter can be fully resolved through a final trial on the merits in September, 2009. And the State respectfully submits that the Court should enter a schedule that would enable it to do so before another poultry waste disposal cycle that would pollute the waters of the State and endanger its citizens.

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